United States Department of Labor
Board of Alien Labor Certification Appeals
Washington, D.C.

Date: January 30, 1998

Case No: 96 INA 401

In the Matter of:

MIKE MALFETTONE,
Employer

on behalf of

DELMIR MACHADO,
Alien.

Appearances:

Before: Huddleston, Lawson and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of DELMIR MACHADO, (Alien) filed by MIKE MALFETTONE (Employer), pursuant to § 212(a)(14)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(14)(A) (the Act), and regulations promulgated thereunder, 20 CFR Part 656. After the Certifying Officer (CO) of the U. S. Department of Labor at New York, New York, denied this application, the Employer requested review pursuant to 20 CFR § 656.26.[1]

Statutory authority. An alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa, if the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient U. S. workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in the Appeal File (AF), and written arguments of the parties. 20 CFR § 656.27(c).

the alien will not adversely affect the wages and working conditions of the U. S. workers similarly employed. See 8 U.S.C. § 1182(a)(14)(A). An employer desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. Such requirements include the responsibility of the employer to recruit U. S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U. S. worker availability at that time and place.[2]

STATEMENT OF THE CASE

Application. On December 27, 1994, the Employer applied for labor certification to enable the Alien, a national of Brazil, to fill the job of "Head Electrician's Helper." AF 01-04. The position offered was classified as "Electrician" under DOT Occupational Code No. 824.261-010.[3] The Employer described the job as follows:

> Assists electrician to plan layout, install, repair wiring, electrical fixtures, apparatus, control equipment: Plan new or modified installations. Prepares sketches showing locations of wiring, equipment or follows diagrams or blueprints, ensuring that concealed wiring is installed before completion of future walls, ceilings, flooring. Measures, cuts, bends, threads, assembles; installs electrical conduit, using tools, such as hacksaw, pipe threader, conduit bender. Splices wires using knife or pliers, twisting soldering wires together, applying tape or terminal caps. Connects wiring to lighting fixtures and power equipment, installs grounding leads. Tests continuity of circuit, tests for safety using chmmeter, battery, buzzer,oscilloscope. Observes functioning of installed equipment or system to detect hazards. Cut, weld steel structural members,

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[2]Administrative notice is taken of the Dictionary of Occupational Titles, ("DOT") published by the Employment and Training Administration of the U. S. Department of Labor.

[3]**DOT No. 824.261-010 ELECTRICIAN** (construction) alternate titles: wirer Plans layout, installs, and repairs wiring, electrical fixtures, apparatus, and control equipment: Plans new or modified installations to minimize waste of materials, provide access for future maintenance, and avoid unsightly, hazardous, and unreliable wiring, consistent with specifications and local electrical codes. Prepares sketches showing location of wiring and equipment, or follows diagrams or blueprints, ensuring that concealed wiring is installed before completion of future walls, ceilings, and flooring. Measures, cuts, bends, threads, assembles, and installs electrical conduit, using tools, such as hacksaw, pipe threader, and conduit bender. Pulls wiring through conduit, assisted by ELECTRICIAN HELPER (any industry) 829.684-022. Splices wires by stripping insulation from terminal leads, using knife or pliers, twisting or soldering wires together, and applying tape or terminal caps. Connects wiring to lighting fixtures and power equipment, using handtools. Installs control and distribution apparatus, such as switches, relays, and circuit-breaker panels, fastening in place with screws or bolts, using handtools and power tools. Connects power cables to equipment, such as electric range or motor, and installs grounding leads. Tests continuity of circuit to ensure electrical compatibility and safety of components, using testing instruments, such as ohmmeter, battery and buzzer, and oscilloscope. Observes functioning of installed equipment or system to detect hazards and need for adjustments, relocation, or replacement. May repair faulty equipment or systems [ELECTRICIAN, MAINTENANCE (any industry) 829.261-018]. May be required to hold license. May cut and weld steel structural members, using flame-cutting and welding equipment. May be designated according to work location as Mine Electrician (mine & quarry). GOE: 05.05.05 STRENGTH: M GED: R4 M4 L3 SVP: 7 DLU:

> using flame-cutting, welding equipment. Plan, layout and connection of refrigeration systems of air conditioning units; layout, connect security and alarm systems. Supervise one.

AF 04.[4] Employer offered a salary of $1050.00 a week for this position that required 35 hours a week from 7:00 AM to 3:00 PM, with overtime as needed, for which Employer agreed to pay one and one-half times the hourly wage. The Educational requirement was high school graduation and four years of experience in the Job Offered, with fluency in Portuguese and proficiency in Spanish. *Id.*

Notice of Findings. The Certifying Officer (CO) issued a Notice of Findings (NOF) on February 21, 1996, advising the Employer that certification would be denied, subject to rebuttal. AF 55-60. (1) Finding that the Employer's requirement of fluency in Portuguese and proficiency in Spanish was restrictive, the CO required the Employer to document its business necessity for its foreign language requirements. (2) The CO also found that the alien did not have the experience required by Employer's job announcement before being hired by Employer. The CO inferred that the Alien had been trained by Employer and directed the Employer to demonstrate that his job requirements are the minimum necessary for the performance of the duties of the position, that he had not hired or could not hire workers with less training and experience to perform those duties, and that training a U.S. worker is not now feasible. 20 CFR §§ 656.21(b)(2), 656.21(b)(5).

In addition, the CO noted that three U. S. job applicants met the experience requirement listed in the job offer and that they had more experience than the alien. The CO found that the Employer's rejection of the U.S. applicants did not arise from lawful job-related reasons. Finally, the CO found the Employer's method of contacting applicants Coutinho and Happel unacceptable. Moreover, the CO said that the applicants Matos, Coutinho and Happel appeared qualified, based on their resumes, and that the reasons for their rejection were neither lawful nor job related.
AF 55-60.

Rebuttal. Employer's March 22, 1996, Rebuttal consisted of a statement by Employer's president. AF 61-76. The statement set out the reasons Employer's the language requirements were a business necessity. Also, the statement argued that the Alien's experience with the Employer was in substantially different work because in this job the Alien he would be required to supervise another employee as a Senior Electrician's Helper. The Employer said it would be undue hardship to hire a worker with less than the four years experience required was not feasible because of the small size of his firm.

In discussing the U.S. applicants the Employer said that he interviewed Mr. Matos over the telephone, but did not hire him because this applicant did not have four years experience in

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[4]The Occupation of "Electrician" encompasses the work of an "ELECTRICIAN HELPER (any industry) 829.684-022," which was included in the text of Occupational Code No. 824.261-010, in footnote 3, *supra*. .

some of the specific job duties listed in spite of his four and one-half years of experience as an electrician's helper. Employer added that he made extraordinary efforts to contact Mr. Coutinho, repeating his earlier description of these efforts. The Employer said Mr. Coutinho was rejected because he was not trustworthy, as his prior employer asserted that this applicant was fired for substandard performance and was paid a wage that was different from that alleged by the applicant. Finally, Employer said that Mr. Happel was unqualified because did not have the requisite experience in specific job duties, that he does not speak Portuguese, and that his Spanish is only "minimal." The Employer then said that the minimum requirements for the position of Senior Electrician's helper are four years' experience plus proficiency in Spanish and fluency in Portuguese. The Employer added that although the Alien did acquired gained his related experience as an electrician's helper with the Employer, his duties in the job offered would be substantially different and would include additional duties as Senior Electrician's Helper, including, *inter alia*, supervising other employees and conducting unassisted interviews.

Final Determination. The CO's Final Determination denying certification was issued on April 2, 1996. AF 77-79. Although the CO found that the Employer had successfully proven a business necessity for the language requirements, he said the Employer had failed to show why training a U.S. worker for the job opportunity was not feasible. Because the Alien did not have the requisite experience when he was first hired the Employer had been directed to explain why it was not feasible to train a U. S. worker in the job or to submit evidence clearly showing that the Alien had the required experience when he was hired. The CO said the Employer failed to establish that he hired the Alien for a substantially different job, as the only difference between the two positions is that the Alien would now supervise one employee. The CO found the Employer did not comply with 20 CFR 545.21(b)(5), in that he failed to demonstrate that its job requirements are the minimum necessary for the performance of the duties of the position. In addition the Employer failed to show that he had hired workers with less training or experience for jobs similar to this one, or that the hiring of workers with less training or experience was not feasible. Finally, because the CO found that the Employer did not submit evidence establishing that he had contacted applicants Matos and Coutinho, and that the Employer had failed to show that his reasons for rejecting these U. S. workers were lawful and job related, he concluded that the Employer had not complied with 20 CFR § 656.20(c)(6).

Appeal. On April 29, 1996, the Employer appealed and requested that the matter be referred to BALCA. AF 80-97. The Employer submitted a brief on October 8, 1996. On May 2, 1997, Employer submitted copies of letters of experience for the alien with translations.

Discussion

20 CFR § 656.21(b)(5) requires the employer to prove that its hiring criteria represent the employer's actual minimum requirements for the position. The employer must also show that it has not hired workers with less training or experience for jobs similar to the job offered or that it is not feasible to hire workers with less training or experience than that required by the position at issue. By preventing the employer from requiring greater qualifications of a U. S. worker than it demands of the alien the employer is prevented from treating the alien more favorably

than it treats a similarly situated U. S. worker. **ERF Inc., d/b/a/ Bayside Motor Inn,** 89 INA 105 (Feb. 14, 1990). It is well established that when an employer has hired an alien with lower qualifications than it is now requiring of U. S. candidates for the same job, it has violated 20 CFR § 656.21(b)(5) unless it demonstrates that it is not feasible to hire a U. S. worker without the training or experience it now demands. **Capriccio's Restaurant,** 90 INA 480 (Jan. 7, 1992).

Although the CO first noted that the Employer hired the Alien with no experience or prior training, the Employer did not submit documentation of the Alien's experience until after he had filed his appeal to BALCA in May, 1997. Under the regulations, however, the Board must review the denial of labor certification on the basis of the record referred, including any statements of position or legal briefs. For this reason, any evidence that is first submitted after Employer's appeal will not be considered. **Capriccio's Restaurant**, 90 INA 480 (Jan. 7, 1992). Consequently, based on the record on which the denial of labor certification was made the panel will affirm the CO's finding that the Employer required that U. S. job applicants show four years' experience in the job offered even though the Alien had no experience before he was first hired by the Employer.

On rebuttal, the Employer stated the alien was hired for a substantially different job that then one being offered for labor certification. The Employer also contended that the alien gained his four years of experience in the related job that substantially differs from the job offered since the new job requires supervision of one employee.

If the alien's experience with Employer for at least four years is sufficient to meet the Employer's experience requirement for the job offered, then it follows that the job duties are not substantially different from the job offered. The Employer did not require four years of experience in a related job, but rather required four years experience in the job offered. Under such circumstances, Employer cannot then argue that the jobs are dissimilar if he credits the experience for the alien. Thus, Employer must demonstrate why it is not now feasible to hire a U.S. worker with no experience and provide training and related experience for four years as was provided to the alien.

Employer's burden of showing why it is not now feasible to offer the same favorable treatment to U.S. applicants has been characterized as "heavy." **58th Street Restaurant Corp.**, 90 INA 058 (Feb.21, 1991). Employer must persuasively document a change in circumstances in order to demonstrate infeasibility. **Rogue and Robelo Restaurant and Bar**, 88 INA 148 (Mar. 1, 1989)(*en banc*). A bare statement of infeasibility to train is not adequate to prove that an employer cannot now hire workers with less experience and provide training. **MMMATS, Inc.**, 87 INA 540 (Nov.24, 1987). Such proof must show more than the inefficiency the employer contends will result. **Admiral Gallery Restaurant**, 88 INA 065 (May 31, 1989)(*en banc*).

This Employer relied on unsupported assertions that the volume of his business has increased, arguing that every member of the firm plays an integral part in everyday operations, that there is no time to train new staff, and that inexperienced assistants would be a liability or

potential hazard in the course of operations.[5] While an electrician's job may be hazardous work requiring strong safety concerns, Employer failed show why it was not feasible and hazardous at the time he hired the Alien without the requisite experience and why it is not now feasible to offer to a U. S. worker the same opportunity that he gave to the Alien.

As we affirm the CO's finding that the Employer failed to prove that the job for which the Alien was hired and the position at issue are dissimilar, we find Employer did not establish that his hiring criteria are the actual minimum job requirements. We also find Employer did not document that it is not now feasible to hire workers with training or experience similar to the level of the Alien's training and experience at the time he was first hired.

Accordingly, we find the CO's denial of certification was based on sufficient evidence and should be affirmed, and the following order will enter.

ORDER

The Certifying Officer's denial of labor certification is hereby Affirmed.

For the Panel.

FREDERICK D. NEUSNER
Administrative Law Judge

[5]This, of course, assumes that the panel would ignore the CO's unrefuted findings that the three U. S. workers who applied for the job were, in fact, qualified and that they did not need such additional training.

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.